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NO. ____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

DOUGLAS JEROME TOOKES,
Petitioner,

vs.

LEROY N. STYNCHCOMBE,
Sheriff of Fulton County, Georgia,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION

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78 pp

QUESTIONS PRESENTED

1. Did the Court of Appeals err in affirming the District Court's ruling that habeas corpus consideration was precluded of Petitioner's Complaint that the State wiretap, which led to this prosecution, was without probable cause and led directly to conviction and incarceration, based upon non-probative and unreliable evidence?

2. Did the Court of Appeals err in affirming the District Court's ruling:

   a. That habeas corpus consideration was precluded of Petitioner's Complaint, under the Fourth Amendment, that the Trial Court failed to make an objective assessment of alleged minimization by the police of the interception of personal conversations, to the extent intelligible, by failing and refusing to listen to the original and unedited wiretap recordings?

   b. That such refusal did not render Petitioner's Trial, as a whole, fundamentally unfair, in violation of due process of law?

3. Did the Court of Appeals err in affirming the District Court's ruling that the Trial Court's failure to provide notice or a hearing to Petitioner regarding a Juror who, in the course of the Trial, privately communicated by note to the Trial Judge bias on his part and requested reconsideration of his qualifications as a juror, was not violative of due process of law?

4. Did the Court of Appeals err in affirming the District Court's ruling that there is sufficient, though minimal, evidence in the record to permit a rational jury to find Petitioner guilty beyond a reasonable doubt?

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

OPINION BELOW

The judgment of the United States Court of Appeals for the Eleventh Circuit is reported at 723 F.2d 918 (1983), and the Opinion is unreported.

JURISDICTION

The judgment of the United States Court of Appeals for the Eleventh Circuit was entered on December 16, 1983. Timely Petition for Rehearing and Suggestion for Rehearing En Banc was denied on January 23, 1984. Mandate was issued on February 2, 1984. The jurisdic-

tion of this Court is invoked under 28 U.S.C. 1254(1) and United States Supreme Court Rule 17.1(a) and (c), 28 U.S.C.

CONSTITUTIONAL PROVISIONS INVOLVED

Fourth Amendment to the Constitution of the United States:

The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Fourteenth Amendment to the Constitution of the United States:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

For the convenience of the Court, Petitioner will use the following designations herein:

"R"—Record in the District Court;

"Supp. R"—Supplemental Record in the District Court;

"T"—Transcript of the Trial in Fulton County Superior Court;

"SR" – Record in Fulton Superior Court;

"Supp. T" – Supplemental Transcript of a post-trial hearing in Fulton Superior Court.

A. In Courts of the State of Georgia

Petitioner was indicted with nine others in one count for alleged conspiracy and alleged attempt to violate the Georgia Controlled Substances Act under former Ga. Code Section 79-A-812 (now Official Code of Ga. 16-13-33), (SR-3), and was tried with four others.

Based upon alleged probable cause in an Affidavit (R-59-69) (T-2245 F.) (Appendices "A" and "B"), which Petitioner contends is riddled with constitutionally worthless bald assertions of suspicions, conclusions, innocuous observations, stale information and falsehood, resulting in a general warrant (R-33, 70-80), a wiretap warrant and extension warrant (T-2254 f. 2257 f.) issued for telephones of people other than Petitioner, at a house where Petitioner had not lived since 1968 or 1969 (T-1884). Evidence, offered for impeachment purposes only, indicated this address on a corporate charter of Petitioner in 1974 (T-1893, 1894). He had been seen there visiting in 1979 and 1980 (T-1993-2000). As a result, massive interceptions and recordings were made (T-194) of what Petitioner contends to be substantially unintelligible conversations, a substantial quantity of which Petitioner insists consists of irrelevant and non-minimized personal conversations, to the extent decipherable (T-207), from which copies of excerpts were patched together by the District Attorney, (T-194-199) and, over objection, (T-625, 1479, 1483) were allowed into evidence, after the trial court refused to consider the original and unedited recordings as evidence of whether or not there was failure

to minimize (T-624, 625). In several of these very brief conversations, which the Court Reporter considered substantially unintelligible, officers said that one voice was that of Petitioner (T-1624, 1625, 1633, 1634, 1648, 1705, 1719, 1734, 1735, 1740, 1746, 1760 and 1823). Upon these voice identifications, only 3 of which were alleged in the Indictment and in 2 of which the other alleged party was acquitted of the indicted charge (SR-3) (T-2233), and without any drug being found at the surveilled house (T-1235) or in any way connected to Petitioner (T-1881), he was found guilty under former Georgia Code Section 79-A-812, (now Official Code of Georgia 16-13-33), which Petitioner contends does not define a crime (SR-40-44) and by a jury which contained a member who expressed privately to the trial judge a bias toward the Defense side, about which Petitioner was given neither notice nor hearing (R-85), (SR-88-89), (Supp. T-1-7, 21-23, 25, 26). Petitioner was sentenced to 20 years to serve. (SR-85).

Prior to trial Petitioner filed a Motion to Suppress the wiretap evidence, on the grounds that there was not probable cause for the issuance of the Investigation Warrant or Extension Warrant and that they were illegally executed and the conversations were unlawfully intercepted because of what Petitioner contends was substantial and massive failure of monitoring officers to minimize the interceptions of personal and private irrelevant conversations, to the extent decipherable, (SR-72). The trial court denied the Motion (T-588).

Prior to trial Petitioner demurred to the Indictment (SR-40, 44) on the ground, among others, that it failed to charge an offense, since it was explicitly based upon former Georgia Code Section 79-A-812, (now Official Code of Ga. 16-13-33), which Petitioner contends does not de-

fine an offense but only prescribes punishment for other offenses. The trial court overruled the demurrer (T-47). The point was renewed by Motion in Arrest of Judgment (SR-90) which was overruled (SR-101).

Petitioner moved the trial court for a directed verdict of acquittal (T-1838) which was denied (T-1840).

After Petitioner's appeal was filed to the Court of Appeals of Georgia, his Counsel discovered the private message from the Juror to the Trial Judge (R-85, 179), about which neither Petitioner nor Counsel had received either notice or hearing (Supp. T. 1-7, 21, 24, 25-26).

At a post trial colloquy the Trial Judge denied Petitioner's Counsel's motion to hold a hearing, subpoena the Juror for questioning and to order that Petitioner and other Defendants be brought in (Supp. T-26).

All issues raised in the Petition were exhausted in the Georgia Courts (R-174).

B. **In the District Court**

On March 16, 1982, Petitioner filed Petition for Writ of Habeas Corpus by a Person in State Custody, under authority of 28 U.S.C. 2254, (R-3f).

In the District Court the case was adjudicated on the basis of the pleadings and the Record from the Georgia Courts.

The District Court adopted, in essence, the Magistrate's Report and Recommendation (R-172, 185), over objections of Petitioner (Supp. R-4-57), and dismissed the Petition (R-193, 196). Judgment was entered on July 21, 1983 (R-197). The United States Court of Appeals for the Eleventh Circuit affirmed as aforesaid.

REASONS WHY THE WRIT SHOULD BE GRANTED

There really are special and important reasons why the writ of certiorari should be granted in this case. The Fourth Amendment and Fourteenth Amendment due process violations in the Georgia Courts were lethal and directly caused an unjust conviction.

The Fourth Amendment violations fit perfectly the exception reserved by *Stone v. Powell*, 428 U.S. 465, 96 S.Ct. 3037, 49 L.Ed.2d. 1067 (1976), for habeas corpus relief where Fourth Amendment violations infect the probativiness of the evidence and produce injustice. Yet, the lower federal courts in this case, ostensibly seem to assume that *Stone, supra*, precludes such relief in any and all Fourth Amendment cases. This petition presents the ideal opportunity for the Supreme Court to elucidate the exception which was reserved in *Stone, supra.*

If the peculiar mixture of prejudices had been absent in the Trial Court proceedings surely a remedy would have ensued for the due process violations, one of which tainted the very integrity of the jury composition, and another of which directly challenges the validity of the verdict on the merits, under *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed. 2d. 560 (1979).

With this Petition our Judicial System has the last opportunity to confront with our Constitution these abuses inflicted upon Petitioner.

1. **The wiretap authorized by the State, which caused this prosecution, was without probable cause and led directly to Petitioner's illegal and unconstitutional incarceration, based upon non-probative and unreliable evidence, in violation of Petitioner's Fourth Amendment**

rights, and is the exceptional kind of Fourth Amendment violation which should be considered on Habeas Corpus.

The District Court held that consideration of this ground is precluded by *Stone v. Powell*, 428 U.S. 465, 96 S.Ct. 3037, 49 L.Ed. 2d. 1067 (1976) and *O'Berry v. Wainwright*, 546 F.2d. 1204 (5th Cir. 1977), *cert. den.* 433 U.S. 911 (1977). The District Court correctly characterizes the general rule of *Stone v. Powell, supra:* "The ruling is based on the conviction that state court decisions concerning the protection of federal constitutional rights should be respected and that Fourth Amendment violations, which *often* relate to the inclusion of *probative evidence, usually* have very little to do with the basic justice or injustice of an incarceration." (Emphasis Supplied)

Stone, et al, supra, explicitly leaves the way open for habeas corpus relief in the exceptional case where Fourth Amendment violations infect the probativeness of the evidence and produce injustice. In Footnote "31" the Majority Opinion says:

> We nevertheless afford broad habeas corpus relief, recognizing the need in a free society for an additional safeguard against compelling an innocent man to suffer an unconstitutional loss of liberty. The Court in *Fay v. Noia,* (372 U.S. 391 (1963)) *supra,* described habeas corpus as a remedy for "whatever society deems to be intolerable restraints," and recognized that those to whom the writ should be granted "are persons whom society has grievously wronged". 372 U.S. at 401, 441. But in the case of a typical Fourth Amendment claim, asserted on collateral attack, a convicted defendant is usually asking society to redetermine an issue that has no bearing on the basic justice of his incarceration.

In a concurring Opinion, Mr. Chief Justice Burger says:

> In *Bivins* (*Bivins v. Six Unknown Named Federal Agents*, 403 U.S. 388, 441 (1971)), I suggested that, despite its grave short comings, the rule, (exclusionary rule) need not be totally abandoned until some meaningful alternative could be developed to protect innocent persons aggrieved by police misconduct . . ."

The proper limits of *Stone v. Powell, supra,* are further clarified and emphasized in *Jackson v. Virginia,* 443 U.S. 307, 99, S.Ct. 2781, 61 L.Ed. 2d 560 (1979), where Mr. Justice Stewart, who was a member of the Majority in *Stone, supra,* in speaking for the Court says in Division "III C":

> The constitutional issue presented in this case is far different from the kind of issue that was the subject of the Court's decision in *Stone v. Powell, supra.* The question whether a defendant has been convicted upon inadequate evidence is central to the basic question of guilt or innocence. The constitutional necessity of proof beyond a reasonable doubt is not confined to those defendants who are morally blameless. e.g. *Mullaney v. Wilbur,* 421 U.S. 684, 697-698 (requirement of proof beyond a reasonable doubt is not "limited to facts that if not proven would wholly exonerate" the accused). Under our system of criminal justice even a thief is entitled to complain that he has been unconstitutionally convicted and imprisoned as a burglar.

Petitioner's case is the perfect example of such an exceptional case. He was incarcerated as the result of a state conviction which rests upon some evidence, minimal in quantity, shockingly unreliable in quality and of extremely dubious probative value consisting of several substantially unintelligible telephone conversations. This

evidence, such as it was, resulted from a wiretap, the affidavit for which was devoid of constitutionally required probable cause but rather was infested with constitutionally deficient and worthless bald assertions of suspicions, conclusions, prejudices, innocuous observations, stale information and falsehood, resulting in a general warrant.

It is of fundamental concern that the evidence upon which Petitioner's conviction rests is unreliable and of insufficient probative value to prove guilt beyond a reasonable doubt. (See "Statement of the Case")

Why would a trial court and a jury allow conviction of any human being on the basis of such a shocking lack of evidence and scraps of unintelligible and unreliable evidence? This fundamental and unconscionable miscarriage of justice was a lethal harvest. The fertile soil was the public panic about the "drug problem." The seed was the bald conclusional assertion by an undisclosed criminal informant who allegedly told the affiant police detective, without any real evidentiary corroboration, that Petitioner was a drug dealer. This seed was nourished and cultivated by the exciting but constitutionally worthless allegations of the Affidavit. The psychological context that resulted suggested to the Trial Court, the Jury, the Georgia Appellate Courts and now the District Court and Court of Appeals, that though there was a dearth of evidence relating to Petitioner, the conjecture was that he was supposed to be the big black man behind the scenes.

Therefore, of fundamental significance is the fact that the substantially unintelligible edited bits and pieces of wiretap recordings, which the court reporter was unable to understand (T-1623-1829), allowed the District Attorney, the Jury, the Georgia Courts and the lower Federal

Courts to assume that somewhere therein there must be evidence to support the conjecture. The combination of this conjecture and the substantially unintelligible and ambiguous telephone conversations fostered prejudicial interpretations where innocent ones would have been more reasonable.

Hence, the totally unreliable information in the Affidavit (R-59-69; 33, 70-80), which was a gross Fourth Amendment violation, led directly to a total misunderstanding of the evidence, such as it was, and conviction of an apparently innocent man.

The procedure was provided at the trial and appellate levels for consideration. However, this legal issue did not receive full consideration by the Georgia Court of Appeals because it did not properly apply the requisite Fourth Amendment standard of *Spinelli v. U.S.*, 393 U.S. 410, 89 S.Ct. 584, 21 L.Ed. 2d 637 (1969). As far as Petitioner's position is concerned, the recent case of *Illinois v. Gates*, U.S. 103, S.Ct. 2317, 76 L.Ed. 2d 527 (1983), makes no material difference because the defects in the affidavit below fail the "totality of the circumstances" test as dismally as they fail the "two pronged test" of *Spinelli*.

The instant case is a classical example of the "occasional abuse" by state courts that habeas corpus should remedy. See *Jackson v. Va.*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed. 2d 560 (1979). Division "III C", citing *Brown v. Allen*, 344 U.S. 443, 498-501.

This case is a perfect example of a Fourth Amendment violation leading to due process violations relating to the reliability of the evidence, where habeas corpus will provide the remedy.

Therefore, Petitioner's case fits the exception allowed by *Stone v. Powell, supra.*

Moreover, a significant additional point that demonstrates the inapplicability of *Stone v. Powell, supra,* to this case is that because of the defective affidavit, the wiretap warrant below falls into the abhorrent category of a general warrant.

In the concurring opinion of Circuit Judge Errin in *Grimsley v. Dodson,* 696 F.2d 303 (1982), it is pointed out as footnote 12:

> It would be an abuse of the trust our federal system places in state officials for the latter to utilize a procedural bar against federal collateral review in order to disregard with impunity federal constitutional standards. Intentional disregard of those standards would constitute a denial of a defendant of the opportunity for full and fair litigation mandated by *Stone v. Powell.* See *Gamble,* 583 F.2d. at 1165.

In *United States v. Christine,* 687 F.2d 749, 757, (3rd Cir.) (1982), the court grasps the considerations for the exclusionary rule:

> The primary justification for the exclusionary rule is its tendency to deter police conduct violative of the Fourth Amendment. *Stone v. Powell,* 428 U.S. 465, 482-86, 96 S.Ct. 3037, 3046-48, 49 L.Ed. 2d. 1067 (1976). A secondary consideration is that convictions secured upon the basis of illegally seized evidence could "compromise the integrity of the courts." *Dunaway v. New York,* 442 U.S. at 218, 99 S.Ct. at 2259. The application of the exclusionary rule in various situations turns upon a "pragmatic analysis of the exclusionary rule's usefulness" that balances the interests safeguarded by exclusion against the public interests served by admission of the evidence. *Stone v. Powell,* 428 U.S. at 488-89, 96 S.Ct. at 3049-50. (Emphasis Supplied)

In *Christine, supra,* the court emphatically repeats the well established rule that the cost to society of sanctioning the use of general warrants, as applies in the instant case, is intolerable by any measure:

> It is beyond doubt that all evidence seized pursuant to a general warrant must be suppressed. *The cost to society of sanctioning the use of general warrants—abhorrence for which gave birth to the Fourth Amendment—is intolerable by any measure. No criminal case exists even suggesting the contrary. The same result applies to warrants unsupported by probable cause but particularly describing the things to be seized, for the particularity and probable cause requirements are inextricably intertwined and, along with the requirement of antecedent justification before a neutral and objective magistrate, are among the most essential foundations of the Fourth Amendment's bulwark against general warrants.* (*Emphasis Supplied*)

Thus, where the warrant is totally unsupported by probable cause, as in the instant case, *Stone, supra,* does not even apply since the very roots of the Fourth Amendment are threatened.

A warrant having the status of a general warrant is so repugnant to society that the full force of the Fourth Amendment demands the exclusion of evidence seized. *Lo-Ji Sales, Inc., v. New York,* 442 U.S. 319, 99 S.Ct. 2319, 60 L.Ed. 2d 920.

Therefore, the fact that the wiretap warrant in the instant case qualified as a general warrant under this line of authority, demonstrates the inapplicability of *Stone v Powell,* in two ways. *Firstly,* since this defect goes to the heart of the integrity of the Fourth Amendment, *Stone v. Powell,* is irrelevant. *Secondly,* the fact that, in reality, the wiretap warrant qualifies as a general warrant, dem-

onstrates from an additional perspective that the *Petitioner's* case meets the exception allowed by *Stone v. Powell,* for habeas corpus remedy of the occasional abuse.

2. The Trial Court failed to make an objective assessment of minimization by the police of the interception of personal conversations, by failing and refusing to listen to the original and unedited wiretap recordings, in violation of Petitioner's Fourth Amendment rights and his due process rights under the Fourteenth Amendment.

The District Court held that consideration of this Fourth Amendment ground is precluded by *Stone v. Powell, supra.*

In addition to what has been said under the first issue of how this case fits the exception, the exclusionary provisions of 18 U.S.C. 2515 F F (wiretap statute) are not confined to the limits of *Stone v. Powell, supra. Llamas-Almaguer v. Wainwright,* 666 F.2d 191 (5th Cir. 1982). *Llamas* leaves open consideration of these wiretap statutory violations where there is "a fundamental defect which inherently results in a complete miscarriage of justice," "an omission inconsistent with the rudimentary demands of fair procedure", or "exceptional circumstances."

Scott v. U.S., 436 U.S. 128, 129 (1), 98 S.Ct. 1717, 56 L.Ed. 2d 168 (1978), commands that the trial court objectively assess the facts and circumstances on the minimization issue. The explicit refusal of the Trial Court below even to listen to the objective evidence (T-624, 625), in order to assess it, clearly constitutes "an omission inconsistent with the rudimentary demands of fair procedure" and "exceptional circumstances," on the exclusionary issue.

The District Court held that the refusal of a hearing

of the objective evidence was not a due process violation because there is probative and reliable evidence of conviction. As aforementioned, Petitioner vigorously contests that conclusion.

Though it is true that the Trial Court's error regarding minimization violations did not, of itself, render the evidence unreliable, the shocking refusal of rudimentary fair procedure by the Trial Judge on this issue graphically illustrates the severity of the prejudicial effect on the Trial Court of the sinister innuendo manufactured by the Affidavit for wiretap warrant.

Therefore, this ground further reinforces the first ground and fits the exception aforementioned.

3. **The Trial Court failed to provide notice or a hearing to Petitioner regarding a Juror who, in the course of the Trial, privately communicated to the Trial Judge bias and prejudice on his part and requested reconsideration of his qualifications as a Juror.**

It is axiomatic that due process of law under the U.S. Constitution requires notice and hearing in regard to matters that affect the loss of one's liberty. *Hovey v. Elliott*, 167 U.S. 409, 416-420 (1897).

After Petitioner's appeal was filed to the Court of Appeals of Georgia, and the record was transmitted, it turned out that a written message was in the Record from a Juror in the case to the Trial Judge, dated August 21, 1980, which was the third day of a three-week trial (R-85, 179) (Appendix "C"). In the message the Juror suggested bias and requested reconsideration of his qualifications as a juror. The Trial Judge had not disclosed this fact to Petitioner, his Counsel, or to Petitioner's Counsel's knowledge, to anyone except by the surfacing

of the document in the Record. (Supp. T. 1-7, 21, 24, 25-26).

The District Court affirmed by the Court of Appeals, misperceived the ground here. The point is not that a Juror was concerned about a spectator. That was incidental. The point is that the Juror expressed bias and prejudice and requested reconsideration of his qualifications as a juror: ". . . it would be difficult for me to be as objective as I feel that I should be in this case. I am therefore requesting reconsideration of my position as a juror in this case." (SR-88-89), (R-85, 179), (Appendix "C")

The District Court, affirmed by the Court of Appeals, from the false premise erroneously concluded that there was ". . . no serious possibility of prejudice to Petitioner and thus did not require that the juror be questioned in a hearing" (R-195).

After Petitioner filed his original brief before the Court of Appeals of Georgia the Trial Judge gathered the Attorneys for Defendants whose new trial motions were still pending and Petitioner's Counsel. Supplemental transcript and record were made, because Petitioner had raised the issue before the Georgia Court of Appeals and the District Attorney had asked the Judge to make a record. (Supp. T-4).

On the occasion, the Trial Judge expressed vagueness of recollection but admitted candidly that he had received the note from the Juror via the Courtroom Deputy Sheriff and decided that it had no bearing on the case and did nothing about it. (Supp. T-1-7)

It developed that prior to this the Deputy had engaged in an ex parte conversation with the Juror and had offered his own opinion to the Juror (Supp. T-9, 10). The Juror

insisted on communicating with the Judge in spite of the Deputy's comments (Supp. T-9, 10). At the Deputy's suggestion the Juror wrote the note in question (Supp. T-9, 10).

The District Court concludes: "According to the deputy's and the trial judge's best recollection, the judge prefaced his question by stating that he had had an inquiry from one of the jurors. The deputy and the judge were unsure of whether the note was mentioned . . . The defense attorneys stated that they had no recollection of a note from a juror being mentioned, and that, if a note had been mentioned, they certainly would have asked to examine both the note and the juror who wrote it" (R-180).

Petitioner's Counsel stated in his place, positively and unequivocably, that no information whatsoever came to his attention regarding the note or its contents until after he had filed Notice of Appeal for Petitioner (Supp. T-5, 15, 21-23). The Trial Judge did not contest this (Supp. T-5).

Furthermore, Petitioner's Counsel moved the Court to hold a hearing, subpoena the Juror as the Court's witness and allow him to be questioned as to the effect of what he observed and what he thought about the Court's declination to act upon the issue of his impartiality. Counsel also moved the Court to order the Defendants to be brought in for the hearing (Supp. T-25). The Trial Judge denied the motion. (Supp. T-26).

The supplemental transcript and record further reinforce Petitioner's contention that the Trial Court erred in denying Petitioner notice and hearing on the issue of bias by the Juror. On the occasion of the making of the supplemental transcript and record the Trial Court com-

pounded its error by continuing to deny a hearing.

The District Court concurred with the Magistrate's concession that the Trial Judge ". . . should have disclosed the fact . . ." of the note and the contents in a recorded proceeding (R-180, 181), and further, that the ". . . procedure used by the trial judge was less than ideal . . ." (R-182-195).

The Georgia law provides detailed due process standards by which it can be determined if a juror is biased but they require a hearing.

The juror must be impartial. *Myers v. The State*, 97 Ga. 76(2), 25 S.E. 252, (1895).

If a question of bias or prejudice arises, disqualification of the juror depends upon the nature and extent of his attitude. Disqualification of the rest of the panel or panels depends upon the extent of corruption of their attitudes by the biased or prejudiced juror. *Westbrook v. The State*, 242 Ga. 151, 154, (3), 249 S.E. 2d 524 (1978); *Sullens v. The State*, 239 Ga. 766 (1), 238 S.E. 2d 864 (1977); *Lingerfelt v. The State*, 147 Ga. App. 371, 372-374(1), 249 S.E. 2d 100, (1978); *Moore v. The State*, 156 Ga. App. 92 (1), 274 S.E. 2d 107, (1980); *Official Code of Ga. Ann.* 15-12-164(2), 15-12-164(3) (Michie, 1982), *Ga. Code Ann.* 59-806(2), 59-806(3) (Harrison, 1977).

There was no hearing to determine the nature and extent of the juror's bias and prejudice or to ascertain corruption of the other jurors because no notice of the problem was given to Petitioner, his Counsel or the Co-defendants or their Attorneys.

These unanswered questions take on even more grave significance when we recall the Jury deliberations. The Jury began deliberations on Thursday, August 28, 1980, and reported slow progress (T-2156). On Friday, August

29, 1980, it asked the Trial Court three questions (T-2158-63) and later found Co-defendant Dyer, guilty (T-2182).

The Jury was unable to reach another verdict on Friday (T-2192). On Tuesday, September 2, 1980, it reconvened and requested further instructions (T-2195). On the same day the Jury found Co-defendant, Bennett, guilty but was unable to reach any further verdicts (T-205-2209). It was still deliberating regarding Co-defendants Starks and Maddox and Petitioner (T-2210).

On Wednesday, September 3, 1980, the Jury was unable to reach a verdict and reported that it was "hopelessly dead-locked" (T-2222, 2224, 2227). The Trial Judge decided to give the "Allen" or "Dynamite Charge" (T-2225), without recharging the principles of presumption of innocence and reasonable doubt, as requested by Petitioner's Counsel (T-2226). The said charge was given (T-2227). On the same afternoon Co-defendant, Maddox, was found guilty of a reduced charge (T-2233), Co-defendant, Starks, was found not guilty (T-2233) and Petitioner was found "guilty of the offense of conspiracy to sell or possess with intent to sell controlled substances . . ." (T-2232, 2233).

It was not until September 15, 1980, that the note from the Juror to the Trial Judge was filed by the Trial Judge (R-88, 89) (R-85, 179).

In regard to the day when the Juror sent the note and received communications from the Judge and the Deputy, the District Court observes: "The juror made no more attempts to communicate with the judge" (T-182). It very well may be that the Juror concluded that any bias he had did not matter to the Judge.

It is well established that the failure of a trial judge to

inform a defendant, even in a recorded proceeding, that a note had been received from a juror and the contents thereof, violated the defendant's due process right to be present at every stage of the proceedings. *Rogers v. U.S.*, 422 U.S. 35, 95 S.Ct. 2091, 45 L.Ed. 2d 1 (1975); *U.S. v. Ronder*, 639 F.2d 931 (2nd Cir. 1981).

In *U.S. v. Forrest*, 620 F.2d 446 (5th Cir. 1980), the Court said on page 457:

> Any off-the-record contact with a jury is presumptively prejudicial, and the government bears a heavy burden of proving that such a contact did not affect the jury. *Mattox v. United States*, 146 U.S. 140, 13 S.Ct. 50, 36 L.Ed. 917 (1982). *United States v. Chiantese*, 582, F.2d 974 (5th Cir. 1978). *United States v. Betner*, 489 F.2d 116 (5th Cir. 1974). If the government cannot meet that burden, a new trial must be ordered. *Remmer v. United States*, 350 U.S. 377, 76 S.Ct. 425, 100 L.Ed. 435 (1956).

U.S. v. Burns, 683 F.2d 1056 (1982), reversed a district court under the due process standard written into the Federal Rules, because of ex parte communication between the trial judge and the jury without advance notice to the defendants or counsel.

The case of *U.S. v. Winkel*, 587, F.2d 705 (5th Cir. 1979), where the Court found no prejudice because the jury may have discovered that a co-defendant pleaded guilty to a conspiracy and the defendant was found not guilty of the same charge, is mainly relied on by the District Court.

This case obviously is totally inapposite to Petitioner's case. Possibly it was relied upon because of the District Court's inadvertent misperception of the issue. In *Winkel, supra*, the verdict proved the lack of prejudice. In the instant case, the verdict, after the jury was "hopelessly

deadlocked" and which was returned only after the "Allen Charge" by the same Judge, whom the Juror logically could have assumed to consider the Juror's suggested bias unimportant, supports the theory of serious prejudice.

In contrast to the basis of the Majority Opinion in *Rushen v. Spain*, ___ U.S. ___, 104 S.Ct. 453, 78 L.Ed. 2d 267 (1983), in the instant case the due process issue is before the Court; explicit bias and prejudice were indicated by the Juror himself; and the Trial Judge failed to provide notice or hearing.

Therefore, Petitioner's liberty was taken by a 20 year sentence, predicated upon a verdict by a jury which contained a member who, on the third day of a three-week trial, privately expressed to the Judge, his bias and prejudice toward the defense side and asked that his qualifications as a juror be reconsidered. Yet, the Judge gave neither notice nor hearing to Petitioner.

4. **The Evidence was insufficient to support a guilty verdict by a rational trier of fact beyond a reasonable doubt.**

Petitioner was charged with "conspiring" (SR-3). The evidence did not show it. He was charged with "attempt". The evidence did not show it. He was charged with certain "overt acts". It was alleged that he maintained a building at 261 Elm Street in 1980. The only evidence was the Corporate Charter (State's Exhibit−40) which showed it as a residence in 1974 (T-2317), and was offered only for impeachment purposes. Petitioner explained that actually he had not lived there since 1969 (T-1892, 1894). It was alleged that he maintained two telephones at the address during the period of March 15, 1980 to May 1, 1980. The evidence failed to show this. It was alleged

that Petitioner participated in three telephone calls. The other party in one of these calls, Co-defendant, Starks, was acquitted. The other party in a second call, Co-defendant, Maddox, was acquitted of the indicted charge and found guilty of a lesser charge (T-2233). The calls where officers claimed to identify Petitioner's voice are substantially unintelligible. The full content of none was intelligible. The bits and pieces that the court reporter transcribed, were so devoid of context that no rational trier of fact who took seriously and conscientiously the presumption of innocence and reasonable doubt could find guilt from them beyond a reasonable doubt, under the United States Supreme Court's standard in *Jackson v. Va.*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed. 2 560 (1979). Also, Petitioner took the stand and explicitly denied and, to a rational trier of fact, refuted the allegations (T-1868-1901).

The District Court concluded the contrary based upon five small segments of the voluminous and porous wire-tap records and some impeachment type evidence, though the District Court conceded that ". . . substantial parts of the taped conversations entered into evidence were unintelligible . . ." and ". . . minimal . . ." (R-195).

To understand fairly and with some reliability a text, one must understand the context. In these pieces of conversation the substantial parts of the context were unintelligible to the trained ear of the Court Reporter. Moreover, on the few occasions where it was claimed that a voice was that of Petitioner, there was no other corroboration of his presence at the house. Furthermore, no witness testified that he had ever seen Petitioner to possess or to sell any drug.

The Indictment only alleges that Petitioner was involved in three telephone conversations, which suggests serious doubt as to whether his voice was properly identified by the officers in additional calls. Two of those calls that were alleged were alleged to be with Starks and Maddox, both of whom the Jury acquitted of the conspiracy charge as aforementioned. (T-2233).

The evidence shows no correlation between occasional visits to the house by Petitioner and any drug activity. This is more suggestive of a romantic contact with Dyer rather than a drug related one, particularly in view of the total lack of any evidence of any drug ever being even in Petitioner's presence.

Therefore, the flimsy bits and pieces of disconnected wiretap evidence in this case are not only consistent with theories of innocence, but innocence is the more reasonable inference. It requires a mind prejudiced by the innuendo and conjecture of the wiretap affidavit to read into this evidence an inference of guilt.

Therefore, the trial court erred in refusing to direct a verdict of acquittal for Petitioner (T-1838, 1840) and was erroneously affirmed in the light of *Jackson v. Va., supra*, because the minor premise, namely, the factual ingredient, was insufficient.

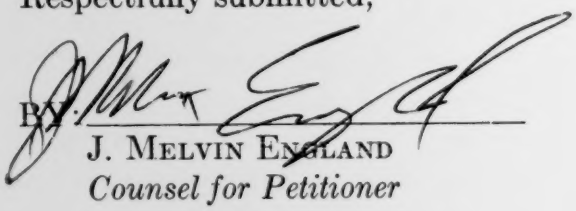
From another perspective, the major premise, namely, the law, was also insufficient, because former Georgia Code Section 79-A-812, now Official Code of Ga. Ann. 16-13-33, upon which the Indictment was based, does not define a crime.

Hence, on the basis of the facts and the law the "Rational Trier of Fact Standard" of *Jackson v. Va., supra*, was not met.

CONCLUSION

For the reasons aforesaid, it is respectfully prayed that a Writ of Certiorari be granted to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

Respectfully submitted,



BY: _____

J. MELVIN ENGLAND
Counsel for Petitioner

Suite 1220 Atlanta Center
Limited Bldg.
250 Piedmont Avenue, N.E.
Atlanta, Georgia 30308
Phone: (404) 659-1990

CERTIFICATE OF SERVICE

I, J. Melvin England, Attorney for the Petitioner herein, and a member of the Bar of the Supreme Court of the United States, hereby certifies that, on the 19th day of April, 1984, I served three (3) copies of the foregoing Petition to the Supreme Court of the United States, for the Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit, upon counsel for the Respondent, Leroy N. Stynchcombe, Sheriff of Fulton County, Georgia, by depositing the same in the United States Mail with proper postage thereon and addressed as follows:

Honorable Benjamin H. Oehlert, III
Assistant District Attorney
301 Fulton County Courthouse
136 Pryor Street, S.W.
Atlanta, Georgia 30303

BY: _____
J. MELVIN ENGLAND
Attorney for Petitioner

Suite 1220 Atlanta Center Limited Bldg.
250 Piedmont Avenue, N.E.
Atlanta, Georgia 30308
Phone: (404) 659-1990

APPENDIX

APPENDIX A

GEORGIA
FULTON COUNTY

AFFIDAVIT OF LAW ENFORCEMENT OFFICER IN SUPPORT OF APPLICATION FOR INVESTIGATIVE WARRANT

Personally before the undersigned officer authorized to administer oaths, comes Sergeant W.E. WOOD, who, being first duly sworn on oath deposes and says that he is Sergeant W.E. WOOD of the Atlanta Bureau of Police Services, and that he is authorized to investigate violations of the Georgia Controlled Substances Act.

Affiant further states that he has been a member of the Atlanta Police Department for seventeen (17) years, and that he has specialized in investigating violations of the Georgia Controlled Substances Act for the past ten (10) years. Affiant was assigned to the Drug Enforcement Administration Task Force for four (4) years and to the Metro Drug Squad for four (4) years. Affiant is presently with the Atlanta City Narcotics Squad.

Affiant further states he is familiar with the various schemes and enterprises devised to conduct illegal sales of drugs in the greater Metropolitan Atlanta area. He states that he has been involved in numerous investigations concerning illegal drug activity and that he not only knows the organizational structure of such enterprises, but is also familiar with the paraphernalia which is commonly used in the operation of drug traffic.

1. BASIS FOR PROBABLE CAUSE

Affiant states that he has received information from a confidential and reliable informant that EMMA LOU

SMITH, LARRY THOMAS, DOUGLAS JEROME TOOKES, MARGARET GAIL WISE, a/k/a Margaret Wise Bennett, STEPHANEY DYER and other unknown persons are engaged in an illegal drug trafficking operation, in violation of the Georgia Controlled Substances Act.

A. RELIABILITY OF INFORMANT

Your Affiant states that he has known the said informant for thirteen (13) years, and that this informant has previously given Affiant reliable information which has resulted in arrests.

Affiant further states that the information received from the said informant in the past has proved reliable, in that Affiant, as well as other members of the Narcotics Squad of the Bureau of Police Services in Atlanta, acting on the said informant's information, have been able to make buys of heroin and cocaine, and have been able to discover significant drug operations, and have, by personal observation, verified information given by the said informant.

Your Affiant has had numerous occasions to speak with said confidential informant and to question said informant concerning said informant's knowledge of illegal drug activity in the Metropolitan Atlanta area. Your Affiant states that this confidential informant is familiar with, and knows and understands the organization of illegal drug activity in the Metropolitan Atlanta area, as well as being familiar with, and recognizing, due to his experience, the various paraphernalia used in illegal drug traffic.

B. INFORMATION FROM RELIABLE INFORMANT

Your Affiant states the the said confidential informant

told your Affiant that a person known as DOUGLAS JEROME TOOKES a/k/a Doug Tookes, runs a "drug house". This house is located at 261 Elm Street, N.W., Atlanta, Fulton County, Georgia, and is a one-story brown brick duplex with yellow trim. This informant told your Affiant that Doug Tookes deals out of the house at 261 Elm Street, N.W., but that he deals only to his "runners". This informant told your Affiant that Tookes does not live in the house at 261 Elm Street, N.W., but that Stephaney Dyer lives there and also sells drugs from that location.

The said informant told your Affiant that unless the potential drug buyer parks his car out of sight of the house at 261 Elm Street, N.W., Tookes will not sell the drugs.

The said informant has told your Affiant that Margaret Gail Wise is one of Doug Tookes' "runners".

The said informant told your Affiant that Margaret Wise told him that the phone number called by her to set up drug buys was 588-1396 and that that phone was at 261 Elm Street, N.W. The informant said that there was another phone number at 261 Elm Street, N.W., also.

The said informant told your Affiant that Tookes goes to New York to buy drugs and that he delivers the drugs to 261 Elm Street, N.W.

C. PHYSICAL SURVEILLANCE

Your Affiant states that Douglas Jerome Tookes has been known to be dealing in illegal drugs since 1972 or 1973.

Your Affiant states that on November 13, 1978, Officer W. R. Carter of the Atlanta Bureau of Police Services, met one of Doug Tookes' "Runners" on Elm Street for

the purpose of buying heroin. The runner made a phone call and then directed Officer Carter to Thurmond and Elm Street and told him to park his car. Officer Carter gave the runner $50.00 for the heroin and $5.00 for her buying it and she walked away and returned about three minutes later with a $50.00 bag of heroin.

Your Affiant states that on November 29, 1978, Officer Carter met a runner for the purpose of buying heroin. The runner told Officer Carter he could get some from "Doug" but that he had to call first. The runner made a phone call and then told the officer it would cost $50.00 plus $7.00 for him. The runner directed Officer Carter to park his car at Thurmond and Sunset. The runner then went toward 261 Elm Street. He returned five minutes later with a $50.00 bag of heroin.

Your Affiant states that on January 1, 1980, Detective J.C. Holloway of the Atlanta Bureau of Police Services and the aforementioned confidential informant met Margaret Gail Wise, a/k/a Bennett, for the purpose of buying heroin. Margaret Wise made a phone call to one of the phones at 261 Elm Street. Detective Holloway, the confidential informant, and Margaret Wise drove to Thurmond and Vine Street and parked. Margaret Wise walked to 261 Elm Street, N.W. and went into the house with $50 provided by Detective Holloway, and returned with $50.00 worth of heroin.

Your Affiant states that on February 4, 1980, Detective C.H. Hunter and Sergeant H.H. Carson ran a tag check on an automobile parked in front of 261 Elm Street, N.W. and found that it had an improper tag. An occupant of the car told the officers that the car belonged to Doug Tookes. The Officers had seen Tookes start to leave the house at 261 Elm Street, but when Tookes saw the

Officer's car, he went back inside. Officer Carson went to the door (locked burglar bar door) of 261 Elm Street N.W. and called for Tookes. Tookes appeared but refused to come outside. Tookes admitted that the automobile was his and told the officers to go ahead and impound the car.

Your Affiant states that on February 21, 1980, the aforesaid confidential informant met Margaret Wise for the purpose of buying heroin. Wise made a phone call in the informant's presence in regard to purchasing a $50.00 bag of heroin. The informant and Wise drove to the corner of Thurmond and Elm Streets and parked the car. The informant gave Wise $60.00. Wise walked to 261 Elm Street, N.W., knocked, and went in. A few minutes later she returned with a glassine bag of suspected heroin.

Your Affiant states that on March 18, 1980, Detective Holloway and the aforesaid confidential informant met Margaret Wise for the purpose of purchasing heroin. Wise told the informant that she had made the call to 261 Elm Street. Detective Holloway, the informant, and Wise drove to Thurmond Street and Wise got out of the car with $50.00 given to her by Detective Holloway and walked to Elm Street. Wise returned to the car with a bag of suspected heroin.

Your Affiant has information that Douglas Tookes owns Mid-Town Auto Sales. Cars registered to Mid-Town Auto Sales are often seen both at 261 Elm Street, N.W., and at Doug Tookes' residence at 2594 Williamsburg Drive, Decatur, Georgia.

Your Affiant has found through normal investigative techniques that the phone number 588-1396 is an unpublished number and is listed to an Emma Lou Smith at 261 Elm Street, N.W. A second number at that address

is 523-5375 and that number is listed to a Larry Thomas. The toll records of these two phones show calls to common numbers out of town; specifically, in October, 1979, calls on both phones were made to a number (404) 549-1851) in Athens, Ga. and on November 27 and 29, 1979, calls on both phones were made to (212) 677-6669 in New York City. The phone number in New York City was found to be listed to an S. Santana and your Affiant has information that the Santana family in New York is known to traffic in heroin. The number called in Athens, Ga. was found to be a public telephone in a service station.

Your Affiant states that on March 31, 1978, a search warrant was executed at 1615 Hasty Place, N.W., the then residence of Douglas Tookes. The officer seized contraband, including marijuana and drug paraphernalia. Also seized was a 1974 phone bill for Emma Lou Smith at 261 Elm Street, N.W., Atlanta, Ga., phone number 523-0332.

Your Affiant states that violations of the drug laws of Georgia involve consenting parties. Due to that fact, rarely are any overt complaints made to the police. The police must rely on information received from informants. This information must be confidential; and the identity of the informant must remain confidential. Otherwise, the police, and in this instance, your Affiant's credibility with the confidential informant would be lost, thereby destroying a source of information with which to investigate violations of the drug laws of Georgia. That is why your deponent has not named the aforesaid confidential informant. Further, should this affidavit become known, and the informant's participation in this investigation exposed, and the informant's identity made known, then

the informant's life would be endangered.

II. NON-APPLICABILITY OF NORMAL INVESTIGATIVE TECHNIQUES

Affiant believes that normal investigative techniques in this case would not be successful for the following reasons: Drug trafficking involves a hierarchy consisting of different individuals of different ranks and status in the organization. It is a conspiratorial type organization. Many individuals are involved to varying degrees. The subjects who are the subjects of surveillance, EMMA LOU SMITH, LARRY THOMAS, DOUGLAS JEROME TOOKES, MARGARET WISE and STEPHANEY DYER, are merely some of the hierarch in the drug-trafficking organization. Affiant also knows from his past experience in working drug cases that, in many instances, the records obtained over the telephone are the only records that indicate the tying in with the individual whose telephone is being tapped and his superiors and/or counterparts in the drug trafficking organization. The purpose of electronic surveillance is to determine to what extent and scope the individual whose telephone would be surveilled is involved in the drug trafficking organization. It is my experience, based upon drug investigations which I have conducted in the past, that the full extent of the conspiracy cannot be obtained by normal investigative techniques. The degree of involvement of subjects EMMA LOU SMITH, LARRY THOMAS, DOUGLAS JEROME TOOKES, MARGARET WISE and STEPHANEY DYER and the other individuals of various degrees of criminal involvement in the drug trafficking organization cannot be determined without this electronic surveillance. Through my personal experience and the experience of other detectives in the Bureau of Police

Services, who have worked drug cases, I also know that the records seized in drug raids generally have not been sufficient to establish the total hierarchy of the organization, but only serve to indicate the one, or at the maximum, a few individuals' participation in the drug trafficking scheme. The confidential informant referred to in this Affidavit is unwilling and afraid to testify since he is in fear of his personal safety if he does testify.

Because of the secrecy with which persons engaged in illegal drug trafficking, and specifically EMMA LOU SMITH, LARRY THOMAS, DOUGLAS JEROME TOOKES, STEPHANEY DYER and MARGARET WISE conduct such unlawful enterprises, investigative procedures now being employed are not reasonably likely to produce any further information concerning violations of the Georgia Controlled Substances Act.

From his physical surveillance of the location, 261 Elm Street, N.W., and from the description of that location given by the confidential and reliable informant, which location is the drug trafficking headquarters operated by Doug Tookes and where the telephone instruments (404) 588-1396 and (404) 523-5375 are located, Affiant has determined that said location is a one-story duplex. There is one front entrance to the duplex which has a locked burglar bar door. Doug Tookes will not come out of the house when police officers are outside and officers have failed in attempts to arrest him. Doug Tookes will deal only with his runners when they come to the house after they have made a phone call to the house and he will not deal when he sees a car parked outside. Affiant has been told by the aforesaid confidential informant that a bucket of acid is kept at 261 Elm Street, N.W. in which the drugs will be dumped in the event a search warrant is

executed. There are windows overlooking the street and yard. Any effort to execute a search warrant would be detected, and the evidence sought would be destroyed before access to the location was gained. Doug Tookes does not live at 261 Elm Street, N.W. so a wiretap is the only means by which sufficient evidence about the drug trafficking operation can be obtained.

III. TELEPHONE INFORMATION

After receiving the foregoing information from the aforesaid confidential and reliable informant, your affiant contacted Southern Bell Telephone and Telegraph Co. and learned the following:

Telephone (404) 588-1396 is listed to EMMA LOU SMITH of 261 Elm Street, N.W., Atlanta, Fulton County, and that service began on that telephone on October 13, 1973, according to Southern Bell Telephone Company.

Telephone (404) 523-5375 is listed to LARRY THOMAS, 261 Elm Street, N.W., Atlanta, Fulton County, Georgia, and that service began on that telephone on July 7, 1972, according to Southern Bell Telephone Company.

Your Affiant does not know whether EMMA LOU SMITH and LARRY THOMAS are real or fictitious persons. However, he has information that STEPHENEY DYER lives at said house and he has seen DOUG TOOKES there.

IV. CONCLUSION

Based on the aforesaid information, your affiant believes that the said EMMA LOU SMITH, LARRY THOMAS, DOUGLAS JEROME TOOKES, STEPH-

ANEY DYER and MARGARET WISE have committed and are committing crimes involved in violation of the Georgia Controlled Substances Act, to wit: Violation of the Criminal Code of Georgia, Section 79A-801, et seq.

Based on the physical surveillance, informant's telephone calls, and affiant's previous experience, it is affiant's opinion that 261 Elm Street, N.W., Atlanta, Fulton County, Georgia, and telephone numbers (404) 588-1396, (404) 523-5375, are being utilized as headquarters for the trafficking of drugs.

Surveillance, as indicated previously, has been conducted but has not furnished sufficient evidence to prosecute and connect all individuals who are involved in this drug trafficking organization. Informant has told affiant who has previously stated in the affidavit, that subject DOUGLAS JEROME TOOKES is operating a drug trafficking organization and that the said Tookes is not the only individual that is involved in the drug trafficking operation, and that there are other individuals who are involved in this operation. One of the purposes of this investigation is to root out those who were ultimately responsible for setting up, opersting, and maintaining this drug trafficking organization. The only way to locate these individuals is through the use of electronic surveillance and at the same time the individuals whose telephone is being surveilled, their total involvement in the illegal drug trafficking operatipn will be discovered.

Your affiant makes this Affidavit for the information of Lewis Slaton, District Attorney of the Atlanta Judicial Circuit, to be annexed as an exhibit to his Petition for Investigation Warrant to intercept, overhear, and record conversations between DOUGLAS JEROME TOOKES and other persons using telephone instruments Nos. (404)

588-1396 and (404) 523-5375 for illegal drug trafficking activities in violation of the Georgia Controlled Substances Act because:

(a) other investigative procedures have been tried and failed;

(b) because of the secrecy with which said persons conduct such unlawful enterprises other investigative procedures reasonably appear unlikely to succeed;

(c) because of the nature of the criminal enterprises involved, other investigative procedures reasonably appear too dangerous to law enforcement personnel to be utilized, in that the employment of normal investigative techniques by such personnel could result in death or injury.

/s/ W. E. WOOD

W. E. WOOD, Sgt. Atlanta Police Bureau

Sworn to and subscribed before me
this 21st day of March, 1980.

APPENDIX B

GRAPHIC EXAMPLE OF SAME AFFIDAVIT FOR WIRETAP WARRANT WITH UNCONSTITUTIONAL MATERIAL DELETED

GEORGIA }
FULTON COUNTY }

AFFIDAVIT OF LAW ENFORCEMENT OFFICER IN SUPPORT OF APPLICATION FOR INVESTIGATIVE WARRANT

Personally before the undersigned officer authorized to administer oaths, comes Sergeant W.E. WOOD, who, being first duly sworn on oath deposes and says that he is Sergeant W.E. WOOD of the Atlanta Bureau of Police Services, and that he is authorized to investigate violations of the Georgia Controlled Substances Act.

Affiant further states that he has been a member of the Atlanta Police Department for seventeen (17) years, and that he has specialized in investigating violations of the Georgia Controlled Substances Act for the past ten (10) years. Affiant was assigned to the Drug Enforcement Administration Task Force for four (4) years and to the Metro Drug Squad for four (4) years. Affiant is presently with the Atlanta City Narcotics Squad.

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1. BASIS FOR PROBABLE CAUSE

Affiant states that he has received information from a confidential and reliable informant that

A. RELIABILITY OF INFORMANT

Your Affiant states that he has known the said informant for thirteen (13) years, and that this informant has previously given Affiant reliable information which has resulted in arrests.

Affiant further states that the information received from the said informant in the past has proved reliable,

B. INFORMATION FROM RELIABLE INFORMANT

This house is located at 261 Elm Street, N.W., Atlanta, Fulton County, Georgia, and is a one-story brown brick duplex with yellow trim.

This informant told your Affiant that Tookes does not live in the house at 261 Elm Street, N.W.,

The said informant told your Affiant that Margaret Wise told him that the phone number called by her to set up drug buys was 588-1396 and that that phone was at 261 Elm Street, N.W. The informant said that there was another phone number at 261 Elm Street, N.W., also.

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Your Affiant states that on February 21, 1980, the aforesaid confidential informant met Margaret Wise for the purpose of buying heroin. Wise made a phone call in the informant's presence in regard to purchasing a $50.00 bag of heroin. The informant and Wise drove to the corner of Thurmond and Elm Streets and parked the car. The informant gave Wise $60.00. Wise walked to 261 Elm Street, N.W., knocked, and went in. A few minutes later she returned with a glassine bag of suspected heroin.

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Your Affiant states that violations of the drug laws of Georgia involve consenting parties. Due to that fact, rarely are any overt complaints made to the police. The police must rely on information received from informants. This information must be confidential; and the identity of the informant must remain confidential. Otherwise, the police, and in this instance, your Affiant's credibility with the confidential informant would be lost, thereby destroying a source of information with which to investigate violations of the drug laws of Georgia. That is why your deponent

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Surveillance, as indicated previously, has been conducted but has not furnished sufficient evidence to prosecute and connect all individuals who are involved in this drug trafficking organization.

APPENDIX C

August 21, 1980

A-51002

To Judge Fryer

In line with the procedure outlined by you in the Courtroom on 8/20/80 for raising issues or questions to be considered by you in reference to this case of which I was selected to serve as a juror, I have a matter which I feel of significance which I would like to address to you.

I am not familiar with any of the defendants, however, during the course of the afternoon, August 20, 1980 while Jury members were being selected, a Mr. Melvin Frazier, better known as "Iron Head" came into the courtroom. I do not know what interest Mr. Frazier has in this case, however, I do know and have known Mr. Frazier for sometime. I would suspect that Mr. Frazier has more than just a passing interest in this case, particularly because I have knowledge of some of Mr. Frazier's past activities with a Drug problem.

In view of this fact, and with the possibility of Mr. Frazier being called as a witness as well as other potential witnesses being called that I might recognize or be familiar with, it would be difficult for me to be as objective as I feel that I should be in this case. I am therefore requesting reconsideration of my position as juror in this case.

/s/ Robert Madison Williams

[Filed in Office, Sept. 15, 1980, Martha Nolan, Deputy Clerk Superior Court, Fulton County, Georgia.]

GEORGIA, FULTON COUNTY,

I, do certify that the within and foregoing is a true, complete and correct copy of the original in said case, as appears by the original on file and of record in the office of C erk of Fulton Superior Court, Criminal Division, Atlanta, Ga.

Witness my hand and the seal of said Court this the 31st day of October, 1980.

/s/ WILLIAM R. KIMSEY
DEPUTY CLERK

APPENDIX D

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA ATLANTA DIVISION

[Filed in Clerk's Office, U.S.D.C.-Atlanta, May 10, 1983, Ben H. Carter, Clerk; By DGT, Deputy Clerk.]

DOUGLAS JEROME TOOKES,
Petitioner,

vs.

LEROY N. STYNCHCOMBE,
Sheriff, Fulton County, Georgia,
Respondent.

CIVIL ACTION NO. C-82-545A and 81-2293A

ORDER FOR SERVICE OF REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE

Attached is the report and recommendation of the United States Magistrate made in this action in accordance with 28 U.S.C. §636(b)(1) and this Court's Local Rule 290. Let the same be filed and a copy, together with a copy of this Order, be served upon counsel for the parties.

Pursuant to 28 U.S.C. §636(b)(1), each party may file written objections, if any, to the report and recommendation within ten (10) days of the receipt of this Order. Should objections be filed, they shall specify with particularity the alleged error or errors made (including reference by page number to the transcript if applicable) and shall be served upon the opposing party. The party filing objections will be responsible for obtaining and filing the transcript of any evidentiary hearing for review by the District Court. If no objections are filed, the report and recommendation may be adopted as the Opinion and

Order of the District Court and any appellate review of factual findings will be limited to a plain error review. *See Nettles v. Wainwright*, 677 F.2d 404 (5th Cir. 1982) (Unit B en banc).

The Clerk is directed to submit the report and recommendation with objections, if any, to the District Court after expiration of the above time period.

AND IT IS SO ORDERED this 10th day of May, 1983.

/s/ ALLEN L. CHANCEY, JR.

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA ATLANTA DIVISION

DOUGLAS JEROME TOOKES,
Petitioner,

vs.

LEROY N. STYNCHCOMBE,
Sheriff, Fulton County, Georgia,
Respondent.

CIVIL ACTION NOS. C82-545A and C81-2293A [1]

MAGISTRATE'S REPORT AND RECOMMENDATION ON STATE PRISONER'S APPLICATION FOR WRIT OF HABEAS CORPUS

This is a petition by a state prisoner for federal habeas corpus relief pursuant to 28 U.S.C. §2254. Petitioner is presently serving a 20-year sentence in the custody of respondent in the Fulton County Jail, Atlanta, Georgia, as a result of a September 3, 1980 conviction in the Fulton County Superior Court for conspiracy to violate the Georgia Controlled Substances Act, Ga. Code Ann. §79A-812, presently Code of Ga. Ann. §16-13-33. (*See* respondent's exhibit, Georgia Court of Appeals Exhibit Record, pp. 3-7, 85.) Petitioner's conviction was affirmed on appeal by the Georgia Court of Appeals on July 15, 1981. *Tookes v. State*, 159 Ga. App. 423, 283 S.E.2d 642 (1981). The Supreme Court of Georgia denied petitioner's appli-

[1] Civil Action No. 81-2293A concerned petitioner's request for an appeal bond pending a decision by the United States Supreme Court on his petition for writ of certiorari. The request was denied as moot by the undersigned Magistrate on May 21, 1982. However, in Civil Action No. 82-545A, petitioner moved to be released on bond pending consideration of his habeas corpus petition and incorporated by reference all of the averments and exhibits in Civil Action No. 81-2293A. The Magistrate therefore consolidated the two actions. (*See* May 21, 1982 Order by the undersigned Magistrate.)

cation for writ of certiorari on October 8, 1981, and on October 20, 1981, petitioner's Motion for Reconsideration was denied. The United States Supreme Court denied petitioner's request for writ of certiorari on February 22, 1982. (*See* paragraph 3 of March 16, 1982 Petition.) On March 16, 1982, the instant petition for habeas corpus relief was filed in this court, and an amendment was submitted on August 5, 1982.

Petitioner claims that he is entitled to habeas corpus relief on the following four grounds: (1) the wiretap authorized by the state during the investigation of this case was ordered without probable cause in violation of petitioner's Fourth Amendment rights; (2) the trial court failed to listen to unedited versions of the wiretap recordings before making a determination that the police had properly minimized the interception and recording of personal conversations in violation of petitioner's rights under the Fourth Amendment and petitioner's due process rights under the Fourteenth Amendment; (3) the trial court failed to provide notice or a hearing to petitioner when a juror wrote the judge a note indicating that he knew one of the spectators at the trial to have a drug problem, in violation of petitioner's right to due process of law; and (4) no rational trier of fact could have found petitioner guilty beyond a reasonable doubt; thus petitioner was convicted in violation of his right to due process of law. Petitioner additionally requests that he be released on a bail bond pending a determination of his petition.

While respondent claims that petitioner has not properly exhausted his third and fourth grounds, the Magistrate finds that all grounds were properly presented to the Georgia courts. (*See* petitioner's brief to the Court of

Appeals, attached to respondent's February 18, 1983 Amended Answer.)

Petitioner's first asserted ground for habeas corpus relief concerns an alleged lack of probable cause to support the authorization of the wiretap from which most of the evidence against petitioner was developed. Petitioner claims that the trial court erroneously refused to suppress the wiretap evidence. Respondent moves to dismiss this ground on the authority of *Stone v. Powell*, 428 U.S. 465, 96 S.Ct. 3037, 49 L.Ed. 2d 1067 (1976), which held:

> [W]here the State has provided an opportunity for full and fair litigation of a Fourth Amendment claim, the Constitution does not require that a state prisoner be granted federal habeas corpus relief on the ground that evidence obtained in an unconstitutional search or seizure was introduced at his trial.

428 U.S. at 494. The ruling is based on the conviction that state court decisions concerning the protection of federal constitutional rights should be respected and that Fourth Amendment violations, which often relate to the inclusion of probative evidence, usually have very little to do with the basic justice or injustice of an incarceration. *Stone v. Powell, supra; O'Berry v. Wainwright*, 546 F.2d 1204 (5th Cir. 1977), *cert. denied*, 433 U.S. 911 (1977).

In the instant case, petitioner litigated his Fourth Amendment claim in a suppression hearing which was held just prior to his trial. (*See* trial transcript, pp.120-636.) The Magistrate concludes that *Stone v. Powell, supra*, clearly precludes this court from examining this alleged Fourth Amendment violation, already fully and fairly considered by the state. *O'Berry v. Wainwright, supra.*

Petitioner's second asserted ground for habeas corpus relief also concerns the wiretap evidence. Petitioner claims that the trial court's finding that law enforcement personnel adequately minimized the interception of private conversations, and the court's failure to listen to unedited versions of the wiretap recordings before making that determination, violated petitioner's right to due process of law and his rights under the Fourth Amendment. Respondent asserts, again, that this ground should be dismissed on the authority of *Stone v. Powell.*

The Magistrate agrees that consideration of this Fourth Amendment claim is precluded by *Stone.* Petitioner litigated his minimization claim in the pretrial suppression hearing. (*See* trial transcript, pp. 120-636.) Petitioner claims that he was not afforded an opportunity for full and fair litigation because of the trial judge's failure to listen to the unedited wiretap tapes before making a determination concerning minimization. The Magistrate initially notes that the trial judge's decision not to listen to all of the unedited tapes was apparently based on his conviction that the adequacy of minimization did not depend upon what was recorded, but upon what efforts were made, under the special circumstances of the case, to minimize *interception* of personal conversation. He noted that the "call waiting" feature of the telephones tapped required that police officers listen to some personal conversation in case a drug-related call came in to interrupt the personal call. (*See* trial transcript, pp. 620-625.) Thus, it appears that the trial judge based his decision not to hear the unedited tapes on his interpretation of Fourth Amendment substantive law, and did not arbitrarily adhere to an unfair procedure.

This Circuit holds that even an obvious substantive

error relating to a Fourth Amendment issue may not be corrected by a federal court on a petition for habeas corpus relief. *Swicegood v. State of Alabama*, 577 F.2d 1322 (5th Cir. 1978).

Moreover, even if the trial judge made a procedural error on a Fourth Amendment issue in this case, this court would still be precluded from considering the Fourth Amendment claim. This Circuit has held that in looking at whether the opportunity for full and fair litigation was provided, the procedures in the state system as a whole are examined, rather than procedures in a particular case.

> [I]n the absence of allegations that the processes provided by a state to fully and fairly litigate fourth amendment claims are routinely or systematically applied in such a way as to prevent the actual litigation of fourth amendment claims on their merits, the rationale of *Caver* dictates that *Swicegood's* application of *Stone* despite a mistake in adjudicating the merits must apply with equal force to procedural mistakes that thwart the presentation of fourth amendment claims.

Williams v. Brown, 609 F.2d 216, 220 (5th Cir. 1980).

> If police officers who are conducting a search or making an arrest are aware that the state criminal justice system provides an opportunity for full and fair litigation of fourth amendment suppression claims, the policy underlying the exclusionary rule will be served.

Caver v. State of Alabama, 577 F.2d 1188, 1192-1193 (5th Cir. 1978).

In *Doescher v. Estelle*, 616 F.2d 205 (5th Cir. 1980), procedures used by the state in considering the habeas petitioner's Fourth Amendment claims were subsequently found unconstitutional by the Supreme Court. The Texas Court of Criminal Appeals, apparently unaware of the

Supreme Court decision, affirmed the conviction. Under these circumstances, the procedural error was recognized by the federal court and the case was sent back to the state for exhaustion, for reasons of comity.

The Magistrate concludes that even if the trial judge's failure to listen to the unedited tapes for evidence of minimization in the instant case was a procedural rather than substantive error, the error was not a reflection of a systematic state practice and thus is not cognizable on habeas corpus. *Williams v. Brown, supra.*

Petitioner additionally claims that the trial court's failure to listen to the unedited tapes before making a minimization determination was a violation of his right to due process of law. In determining whether petitioner's due process rights were violated, this court must determine whether the trial court's actions rendered petitioner's trial as a whole fundamentally unfair. *Nelson v. Estelle*, 642 F.2d 903 (5th Cir. 1981). The Magistrate concludes that petitioner's trial was not rendered fundamentally unfair by the trial court's actions. The trial court's refusal to hear the unedited tapes for evidence of minimization did not render the evidence admitted against petitioner unreliable. There is "no reason to believe that [petitioner] was not convicted on the basis of probative and reliable evidence." *Llamas-Almaguer v. Wainwright*, 666 F.2d 191 (5th Cir. 1982). As petitioner has not demonstrated such a fundamental defect in his trial, the Magistrate concludes that he may not use the "back door" of due process to present his Fourth Amendment claim.

Petitioner claims, in his third asserted ground for habeas corpus relief, that his due process rights were violated by the trial court's failure to provide him notice or conduct a hearing when a juror wrote the judge a note indicating

that he knew one of the spectators at the trial to have a drug problem.

The trial record does not indicate the exact procedure followed by the trial judge after his receipt of the note; however, a hearing was held subsequent to the trial in which the parties stated their recollections concerning the incident. The trial judge, the deputy sheriff, and three of the defense attorneys who were involved in the incident were present at the hearing. The state's repesentative at the hearing had not been present during the note incident. (*See* respondent's exhibit, transcript of January 22, 1981 hearing in the Superior Court of Fulton County, pp. 1-27.)

The deputy sheriff who was on duty during petitioner's trial testified that one of the jurors told him that he knew one of the spectators and asked if he were going to be a witness. The deputy told the juror that he was not a witness in the case, but the juror nevertheless wanted to inform the judge that he knew the spectator. The deputy suggested that the juror write the judge a note. The juror did write the judge a note which stated:

> In line with the procedure outlined by you in the courtroom on 8/20/80 for raising issues or questions to be considered by you in reference to this case of which I was selected to serve as a juror, I have a matter which I feel of significance which I would like to address to you.
>
> I am not familiar with any of the defendants, however, during the course of the afternoon, August 20, 1980 while jury members were being selected, a Mr. Melvin Frazier, better known as "Ironhead" came into the courtroom. I do not know what interest Mr. Frazier has in this case, however, I do know and have known Mr. Frazier for some time. I would sus-

> pect that Mr. Frazier has more than just a passing interest in this case, particularly because I have knowledge of some of Mr. Frazier's past activities with a drug problem.
>
> In view of this fact, and with the possibility of Mr. Frazier being called as a witness as well as other potential witnesses being called that I might recognize or be familiar with, it would be difficult for me to be as objective as I feel that I should be in this case. I am therefore requesting reconsideration of my position as a juror in this case.

(*See* respondent's exhibit, Court of Appeals exhibit record, pp. 88-89.)

The deputy stated that he brought the note to the trial judge. The judge called the prosecutor and the defense attorneys into his office and asked them in the presence of the deputy whether the spectator was going to be a witness in the case. According to the deputy's and the trial judge's best recollection, the judge prefaced his question by stating that he had had an inquiry from one of the jurors. The deputy and the judge were unsure of whether the note was mentioned. According to the deputy, the attorneys informed the judge that the spectator was not involved in the case. The deputy testified that petitioner's attorney stated that the spectator knew the petitioner. The spectator told the deputy that he knew petitioner and one of the co-defendants, but the deputy did not disclose this information to the juror. The trial judge asked the deputy to tell the juror again that the man was just a spectator and was not going to be a witness in the case, and the deputy thus informed the juror.

The defense attorneys stated that they had no recollection of a note from a juror being mentioned, and that, if a note had been mentioned, they certainly would have

asked to examine both the note and the juror who wrote it.

At the supplemental hearing, the judge denied petitioner's request to subpoena the juror as a witness in order to question him about any prejudice he may have had during petitioner's trial.

It is clear, especially in view of the uncertainty in the record, that the trial judge should have disclosed the fact that a note had been received from a juror, and the contents of the note, in a recorded proceeding. *United States v. McDuffie*, 542 F.2d 236 (5th Cir. 1976); *Rogers v. United States*, 422 U.S. 35, 95 S.Ct. 2091, 45 L.Ed.2d 1 (1975); *United States v. Ronder*, 639 F.2d 931 (2nd Cir. 1981). However, the issue before the court in this habeas corpus action is whether plaintiff's right to due process of law has been violated by the court's procedure. That issue turns on whether petitioner can demonstrate prejudice as a result of the trial court's actions. *United States v. McDuffie, supra; United States v. Winkle*, 587 F.2d 705 (5th Cir. 1979), *cert. denied*, 444 U.S. 827 (1979); *Llewellyn v. Stynchcombe*, 609 F.2d 194 (5th Cir. 1980); *United States v. Jones*, 542 F.2d 186 (4th Cir. 1976), *cert. denied*, 426 U.S. 922 (1976); *United States v. Hood*, 593 F.2d 293 (8th Cir. 1979); *United States v. Yonn*, No. 82-5270 (11th Cir. April 22, 1983); *Smith v. Phillips*, 455 U.S. 209, 102 S.Ct. 940, 71 L.Ed. 2d 78 (1982).

Petitioner asserts that his due process rights were violated by the trial court's failure to question the juror about his possible bias in a hearing. The trial judge is permitted much discretion in his actions concerning jury matters. Jurors, once sworn, are presumed to be impartial. Where information which may be adverse to a defendant reaches a juror, the trial court is not obligated

to question the juror unless there is a serious possibility of prejudice. *United States v. Forrest*, 620 F.2d 446 (5th Cir. 1980); *United States v. Edwards*, 696 F.2d 1277 (11th Cir. 1983); *United States v. Jones, supra; United States v. Hood, supra; Aston v. Warden, Powhatan Correctional Center*, 574 F.2d 1169 (4th Cir. 1978).

In the instant case, the trial judge determined, from his conversation with the deputy and the juror's note, that the juror was concerned with the possibility of a spectator, whom he knew to have had a drug problem, becoming a witness in the case. The judge apparently informed counsel that a juror had inquired about the spectator. When assured that the spectator was not involved in the case, the judge had the deputy inform the juror that the person he knew was just a spectator. The juror made no more attempts to communicate with the judge. The Magistrate concludes that, while the procedure used by the trial judge was less than ideal, there was no serious possibility of prejudice to petitioner and thus no constitutional requirement that the juror be questioned in a hearing. *United States v. Winkle, supra; United States v. Edwards, supra; United States v. Jones, supra; United States v. Hood, supra*. The court in *United States v. Winkle* failed to "discern any genuine possibility of prejudice to the defendant . . . from the jury's awareness . . . that he may have associated with a criminally tainted individual." 587 F.2d at 715. (In the *Winkle* case, the jury may have discovered that a co-defendant pleaded guilty to a conspiracy charge. The defendant was found not guilty on the same conspiracy charge, but was found guilty on the substantive counts.) The Magistrate finds that similar circumstances exist in the instant case, and thus concludes that petitioner's due process rights were not violated by the trial judge's actions.

In his fourth and final asserted ground for habeas corpus relief, petitioner claims that the evidence was constitutionally insufficient to support his conviction in that "no rational trier of fact could have fouundproof of guilt beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 324, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). The Magistrate disagrees and concludes that the evidence does support a verdict of guilty beyond a reasonable doubt.

Police officers testified at the trial that they were familiar with petitioner's voice, that the word "boy" and other male terms were often used by drug dealers to refer to heroin, and the the word "girl" and other female terms were used to refer to cocaine. (Trial transcript, pp. 1143-1349, 1380-1424, 1426-1460.) One of petitioner's co-defendant's also testified that "boy" was a slang term for heroin. (Trial transcript, pp.1940, 1957.) Police officers testified that heroin purchases occurred at 261 Elm Street and a wiretap was placed on the telephones in that house. (Trial transcript, pp. 890-1070, 1143-1349, 1380-1424, 1511-1539.) The chain of custody of the wiretap tapes was established. (Trial transcript, pp. 1070-1349, 1426-1460.) Petitioner was heard on the tapes making drug transactions and conducting other personal business. (*See*, i.e., trial transcript, pp.1631-1634, 1704-1705, 1736-1740, 1745-1746, 1755-1760.) Other defendants were heard making numerous heroin and cocaine ("boy" and "girl") transactions on the telephones at 261 Elm Street. Taken as a whole, the wiretap tapes and other evidence could convince a rational trier of fact that petitioner was part of a conspiracy to sell controlled substances.

Moreover, petitioner's testimony that he had had no connection with 261 Elm Street since 1968 or 1969 (trial

transcript, p.1884) was impeached by the testimony of a police officer who saw him there in 1979 and 1980 (trial transcript, pp. 1993-2000) and by a 1974 corporate charter which listed petitioner's address as 261 Elm Street (trial transcript, pp. 1893-1894).

In view of the above, the Magistrate concludes that the evidence used to convict petitioner was constitutionally sufficient under *Jackson v. Virginia.*

Finally, petitioner requests that bail be granted pending the final determination of his petition. Bail should be granted a habeas corpus petitioner only when the prisoner has raised substantial constitutional claims and extraordinary or exceptional circumstances exist which make the grant of bail necessary to make the habeas remedy effective. *Calley v. Callaway,* 496 F.2d 701 (5th Cir. 1974); *see Aronson v. May,* 85 S.Ct. 3, 13 L.Ed.2d 6 (Douglas, Circuit Justice, 1964).

In the instant case, neither a substantial constitutional claim nor extraordinary circumstances are present. Extraordinary circumstances include the petitioner serving a short sentence for a relatively minor crime, a danger of deterioration of petitioner's health while incarcerated, and possibly an extraordinary delay in processing the habeas petition. *Calley v. Callaway, supra,* at 702, n.1. It is clear that these types of circumstances have not been indicated in this case. Thus, the Magistrate concludes that petitioner should not be granted bail pending the final determination of this petition.

RECOMMENDATION

Accordingly, for the reasons set forth above, it is hereby recommended that the petition for writ of habeas corpus be dismissed and petitioner's motion that he be granted bail pending final determination of the petition be denied.

AND IT IS SO RECOMMENDED this 10th day of May, 1983.

/s/ ALLEN L. CHANCEY, JR.

ALLEN L. CHANCEY, JR.
UNITED STATES MAGISTRATE

APPENDIX E

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

DOUGLAS JEROME TOOKES
VS
LEROY N. STYNCHCOMBE,
Sheriff of Fulton County, Georgia

Civil Action
No. C82-545A

JUDGMENT

The Court, Honorable MARVIN H. SHOOB, United States District Judge, by order of this date, having DISMISSED the writ for habeas corpus.

JUDGMENT is hereby entered in favor of the respondent(s) and against the petetioner(s)

Dated at Atlanta, Georgia, this 21st day of July, 1983.

BEN H. CARTER, Clerk

By /s/ CAROL O'DONNELL
Deputy Clerk

FILED AND ENTERED
IN CLERK'S OFFICE
July 21, 1983

Ben H. CARTER, Clerk

By /s/ CAROL O'DONNELL
Deputy Clerk

APPENDIX F

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

[Filed in Clerk's Office, U.S.D.C. Atlanta, July 21, 1983, Ben H. Carter, Clerk; By E. Thornton, Deputy Clerk.]

DOUGLAS JEROME TOOKES, *Petitioner*, v. LEROY N. STYNCHCOMBE, Sheriff, Fulton County, Georgia, *Respondent.*	CIVIL ACTIONS C82-545A C81-2293A

ORDER

This habeas corpus petition brought by a state prisoner pursuant to 28 U.S.C. § 2254 is before the Court on the magistrate's report and recommendation. Petitioner asserts four grounds allegedly entitling him to habeas relief: (1) during its investigation of the case, the state authorized a wiretap without probable cause in violation of his fourth amendment rights; (2) the trial court failed to listen to unedited versions of the wiretap recordings before making a determination that the police had properly minimized the interception and recording of personal conversations, in violation of petitioner's rights under the fourth and fourteenth amendments; (3) the trial court failed to provide notice or a hearing to petitioner, in violation of his due process rights under the fourteenth amendment, when a juror wrote the judge a note indicating that he knew one of the spectators at the trial to have a drug problem and requesting reconsideration of his position as a juror in the case; and (4) the evidence

was insufficient to permit a rational trier of fact to find petitioner guilty beyond a reasonable doubt. Petitioner also requests that he be released on a bail bond pending a determination of his petition and has only recently filed a motion for an emergency hearing on this request.

In his report the magistrate has addressed each of the grounds for relief asserted by petitioner and, finding them to be without merit, has recommended that the petition be dismissed. As set out below, the Court, after carefully considering petitioner's objections and relevant portions of the trial transcript, is in essential agreement with the magistrate's findings and conclusions.

First, insofar as the first two asserted grounds for relief raise claims under the fourth amendment, the Court agrees with the magistrate that their consideration by this Court is precluded by *Stone v. Powell*, 428 U.S. 465 (1976), since the state provided petitioner an opportunity for full and fair litigation of his fourth amendment claims. Furthermore, the magistrate correctly concluded that the trial court's refusal to hear the unedited tapes for evidence of minimization did not render petitioner's trial as a whole fundamentally unfair and therefore did not violate petitioner's due process rights under the fourteenth amendment.

Second, the Court also agrees with the magistrate that the trial court's handling of the inquiry by one of the jurors concerning his acquaintance with one of the spectators, while perhaps not ideal, was not violative of due process. One juror's awareness that a spectator at the trial was involved with drugs created no serious possibility of prejudice to petitioner and thus did not require that the juror be questioned in a hearing. *See United States v. Winkle*, 587 F.2d 706 (5th Cir. 1979).

Finally, the Court's own careful review of the relevant portions of the trial transcript cited by both parties has revealed evidence that is constitutionally sufficient to support petitioner's conviction. The Court is somewhat concerned that substantial parts of the taped conversations entered into evidence were unintelligible; nevertheless, there is sufficient, though minimal, evidence in the record of petitioner's direct involvement in drug transactions, including certain intelligible portions of taped conversations, to permit a rational jury to find petitioner guilty beyond a reasonable doubt. *See Jackson v. Virginia*, 443 U.S. 307 (1979).

The Court being in agreement with the magistrate's analysis of the issues raised by petitioner, his report and recommendation are hereby ADOPTED as the opinion and order of this Court. The instant petition for habeas corpus is accordingly DISMISSED, and petitioner's pending request for release on a bail bond, as well as his motion for an emergency hearing on the request, are DENIED as moot.

IT IS SO ORDERED, this 20th day of July, 1983.

/s/ MARVIN H. SHOOB

MARVIN H. SHOOB, Judge
United States District Court
Northern District of Georgia

APPENDIX G

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

[Filed in Clerk's Office, U.S.D.C.-Atlanta, August 9, 1983, Ben H. Carter, Clerk; By TG, Deputy Clerk.]

DOUGLAS JEROME TOOKES,
Petitioner,

v.

LEROY N. STYNCHCOMBE,
Sheriff of Fulton County, Georgia,
Respondent.

CIVIL ACTION
C82-545A

ORDER

Petitioner's application for certificate of probable cause is GRANTED, and the Court CERTIFIES that there is probable cause for an appeal from its order of July 21, 1983, dismissing the applicant's petition for writ of habeas corpus.

IT IS SO ORDERED, this 8th day of August, 1983.

/s/ MARVIN H. SHOOB

MARVIN H. SHOOB, Judge
United States District Court
Northern District of Georgia

APPENDIX H

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

NO. 83-8583
Non-Argument Calendar

DOUGLAS JEROME TOOKES,
Petitioner,

versus

LEROY N. STYNCHCOMBE, Sheriff
of Fulton County, Georgia,
Respondent.

Appeal from the United States District Court for the Northern District of Georgia

---

(December 16, 1983)

Before FAY, VANCE and KRAVITCH, Circuit Judges.

PER CURIAM:

The judgment appealed is AFFIRMED based upon the trial court's order dated July 20, 1983, which adopts the lengthy and complete report and recommendation of the magistrate dated May 10, 1983.

APPENDIX I

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

[U.S. Court of Appeals, Eleventh Circuit, Filed January 23, 1984; Spencer D. Mercer, Clerk.]

No. 83-8583

DOUGLAS JEROME TOOKES,
Petitioner,

versus

LEROY N. STYNCHCOMBE, Sheriff
of Fulton County, Georgia,
Respondent.

Appeal from the United States District Court for the Northern District of Georgia

---

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion December 16, 11 Cir., 1983, ____ F.2d ____).
( )

Before FAY, VANCE and KRAVITCH, Circuit Judges.

PER CURIAM:

(√) The Petition for Rehearing is DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

/s/ PETER T. FAY
United States Circuit Judge

REHG-6
(Rev. 6/82)

APPENDIX J

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 83-8583
Non-Argument Calendar

D.C. Docket No.C82-545A

DOUGLAS JEROME TOOKES,
Petitioner,

versus

LEROY N. STYNCHCOMBE, Sheriff
of Fulton County, Georgia,
Respondent.

Appeal from the United States District Court for the Northern District of Georgia

---

Before FAY, VANCE and KRAVITCH, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Georgia, and was taken under submission by the Court upon the record and briefs on file, pursuant to Circuit Rule 23;

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby, AFFIRMED.

Entered: December 16, 1983

For the Court: Spencer D. Mercer, Clerk

By: /s/ WARREN A. GODFREY

ISSUED AS MANDATE: Feb. 2, 1984